

Draft Rule Amendments

Rev A (April 24, 2003)

[Proposed additions are double underlined. Proposed deletions are ~~struck-through~~]

- Rule 1-3 Regulations and Advisories
- Rule 1-5 Audit and Compliance
- Rule 1-10 Temporary Agencies
- Rule 8-1 Grievances
- Rule 8-2 Appeals of Grievance Decisions
- Rule 8-4 Summary Dismissal of Grievance Appeal or
Technical Complaint
- Rule 8-7 Appeal to Civil Service Commission
- Rule 9-1 Definitions

Staff Comments to Draft Rule 1-3

The proposal adds to Rule 1-3 a reference to “advisories.” The amendment also clarifies the legal force of regulations and adds the reference to the legal force of advisories. The reference to the legal force of advisories is currently located in the definition of “advisory” in Rule 9-1. That redundant reference, and the similarly redundant reference in the definition of “regulation,” will be deleted. Lastly, in Rule 9-1, the reference to “future” in “future direction” in the definition of “advisory” is removed as unnecessary.

1-3 Regulations and Advisories

The state personnel director is authorized to issue regulations and advisories that the director deems to be necessary or useful. A regulation issued by the state personnel director is binding ~~on the department of civil service~~, unless the commission finds that the regulation violates a rule. An advisory does not have the force and effect of law and is not binding. The state personnel director shall make all regulations and advisories available to employees through their personnel offices and the internet.

9-1 Definitions

Regulation

Regulation means a formal, general written enactment issued by the state personnel director that: (1) exercises, implements, or applies powers granted to the director in article 11, section 5, of the constitution; (2) exercises, implements, or applies powers granted to the director or the department of civil service by civil service rule; or (3) prescribes the procedures or practices of the department of civil service. ~~A regulation is binding on the department of civil service unless the civil service commission finds that the regulation violates a rule.~~

Advisory

Advisory means a written statement issued by the civil service commission, state personnel director, or department of civil service to provide ~~future~~ direction, clarification, or other necessary or useful information. ~~An advisory does not have the force and effect of law and does not bind the commission, director, or department.~~

Staff Comments to Draft Rule 1-5

The proposal (1) adds references to the Michigan Constitution and (2) deletes the phrase “governing personnel transactions.” This broadens Rule 1-5 to cover all civil service matters, not merely “personnel transactions.”

1-5 Audit and Compliance

The department of civil service shall periodically audit an appointing authority to ensure that the appointing authority is complying with article 11, §5 of the Michigan constitution and all civil service rules and regulations ~~governing personnel transactions~~. If the state personnel director determines that an appointing authority has not complied with the constitution, rules ~~or and~~ regulations, the state personnel director is authorized to direct the appointing authority to take necessary corrective action. If the appointing authority fails to take corrective action, the state personnel director is authorized to proceed with the recommended corrective action.

Staff Comments to Rule 1-10

Rule 1-10 contains a potential ambiguity. The current Rule 1-10 *requires* the home agency to “grant a limited and defined right to return” but is *silent* as to the consequences if the home agency fails to do so. If the home agency has not issued approved procedures, what happens to a moved employee if the home agency is abolished and the employee’s position abolished? Staff recommends the following remedy: if the home agency fails to issue approved procedures at least 28 calendar days before a temporary agency is dissolved, a moved employee may exercise employment preference in the home agency in the same manner as if the employee was employed at the home agency.

1-10 Temporary Agencies

1-10.1 Application of Civil Service Rules to Temporary Agencies

All civil service rules and regulations apply to all personnel actions of a temporary agency, except as modified by this rule or regulations issued under this rule.

1-10.2 Limited Right to Return upon Dissolution of Temporary Agency

Each home agency ~~shall~~may grant a limited and defined right to return to the home agency to its employees who become moved employees. A moved employee’s right to return to a home agency is effective only upon (1) the dissolution of the temporary agency and (2) the abolition of the classified position occupied by the moved employee. ~~This rule does not guarantee a moved employee reemployment e-right to return authorized by this rule does not entitle a moved employee to a classified position with~~in a home agency upon the dissolution of a temporary agency.

1-10.3 Approval of Procedures; Default

Each home agency ~~shall~~may issue procedures to implement the right to return for moved employees, subject to review and final approval by the state personnel director. If a home agency does not have an approved procedure in effect at least 28 calendar days before a temporary agency is dissolved and a moved employee’s position is abolished, the moved employee has the right to exercise employment preference in the home agency. The moved employee may exercise employment preference as if the employee had been employed in the home agency at the time of the abolition of the employee’s position in the temporary agency.

9-1 Definitions

* * *

Home Agency

Home agency means the principal department or autonomous agency established under law from which an employee's classified position is moved by executive order to the authority of a temporary agency.

Moved Employee

Moved employee means a career employee whose classified position has been moved from a home agency to the authority of a temporary agency solely as a result of either (1) the creation of a temporary agency or (2) an executive order under article 5, section 2, of the constitution, moving functions or personnel to a temporary agency.

Temporary Agency

Temporary agency means an autonomous commission or agency of the state of Michigan with a life of not more than 2 years, created under article 5, section 4, of the constitution.

Staff Comments to Draft Rule 8-1

When the rulebook was revised, all references to grievances regarding *retaliation* for exercising grievance and technical complaint rights were omitted. Staff recommends that Rule 8-1.3 be amended to explicitly provide for grievances complaining of retaliation for filing a grievance or technical complaint. Staff recommends that Rule 8-2.2 be amended to permit employees to file a grievance appeal to the Department of Civil Service if the retaliation results in a tangible adverse employment action.

Staff also recommends that Rule 8-2.3 be amended to clarify that a “tangible adverse employment action”—in addition to discrimination or whistleblower retaliation—must be alleged before certain employees may file a grievance appeal. This clarification was articulated by the Commission in *Dulai v DCH*, CSC 2002-070.

8-1 Grievances

8-1.1 Grievance Authorized

An employee may file a grievance with an appointing authority, as authorized in the civil service rules and regulations.

8-1.2 Time Limits

A grievance must be filed in writing within 14 calendar days after the employee knew of or, in the exercise of reasonable diligence, should have known of the circumstances giving rise to the grievance.

8-1.3 Types of Grievances

(a) Types of grievances permitted. A grievance must allege that the employee is aggrieved by one or more of the following actions of the appointing authority:

(1) Discrimination prohibited by rule 1-8 [Prohibited Discrimination].

(2) Reprisal prohibited by rule 2-10 [Whistleblower Protection].

(3) Discipline without just cause.

(4) Written counseling issued without just cause.

(5) The abolition or creation of a position for reasons other than administrative efficiency.

(6) An arbitrary and capricious lateral job change resulting in substantial harm.

(7) Retaliation for the employee's good faith exercise of grievance or technical complaint rights provided in the civil service rules or regulations.

(87) An action that substantially harmed the employee and violated (1) article 11, section 5 of the Michigan constitution, (2) a civil service rule or regulation, (3) a departmental work rule, or (4) an enforceable written grievance settlement permitted by the civil service rules or regulations.

(98) Any other action for which the civil service rules or regulations specifically permit a grievance to be filed.

(b) Limitation on grievances.

(1) Grievance not permitted. In addition to any other limitations in the civil service rules and regulations, the following limitations on grievances apply unless the grievant alleges that the action violated rule 1-8 [Prohibited Discrimination] or rule 2-10 [Whistleblower Protection].

(A) SES or SEMAS employee without prior status. A member of the senior executive service [SES] or the senior executive management assistant service [SEMAS] who is separated from state employment at the expiration of an appointment cannot grieve the separation if the employee did not have prior status at the time of appointment to the SES or the SEMAS.

(B) Employee in limited-term position. An employee in a limited-term position whose appointment is terminated at or before the end of the term of appointment due to lack of work or funding cannot grieve the termination.

(2) Management rights. Unless specifically authorized in the civil service rules or regulations, an employee cannot grieve the employer's exercise of any of the rights reserved to management in rule 6-4 [Rights of Employer].

(3) Lateral job change. A grievance regarding a nondisciplinary lateral job change may be grieved only under the provisions of subsection (a)(1), (a)(2), (a)(6), or (a)(7), as appropriate. In addition, a grievance regarding a disciplinary lateral job change may be grieved under the provisions of subsection (a)(3).

(4) Technical appointment complaints. The following complaints cannot be filed as a grievance but must be filed directly with the department of civil service under the technical appointment complaint provisions in rule 8-3 [Technical Complaints]:

(A) Unsuccessful candidate. A complaint by an unsuccessful candidate regarding a technical appointment decision or arising out of the selection, appointment, or certification of a candidate.

(B) Employee whose appointment is revoked. A complaint by an employee whose appointment is revoked in compliance with rule 8-3 [Technical Complaints].

8-1.4 Grievance Decision by Appointing Authority

(a) Grievance review and decision. The appointing authority shall review the grievance and issue a written grievance decision, as provided in the regulations. If the appointing authority fails to answer the grievance within the time permitted in the regulations, the appointing authority is deemed to have denied the grievance.

(b) Appeal of grievance decision. The final grievance decision of the appointing authority is binding unless the grievant files a timely appeal of the decision, as authorized in rule 8-2 [Appeals of Grievance Decisions] and the civil service regulations.

8-2 Appeals of Grievance Decisions

8-2.1 Appeal of Grievance Decision to Department of Civil Service Authorized

A grievant may appeal a final grievance decision of an appointing authority to the department of civil service, as authorized in the civil service rules and regulations.

8-2.2 Limitation on Grievance Appeals

A grievant is not authorized to file a grievance appeal unless the grievance alleges one or more of the following:

(a) A tangible adverse employment action resulting from discrimination prohibited in rule 1-8 [Prohibited Discrimination].

(b) A tangible adverse employment action resulting from reprisal prohibited by rule 2-10 [Whistleblower Protection].

(c) One or more of the following types of discipline imposed without just cause:

(1) Dismissal.

(2) Demotion.

(3) Suspension.

(4) Reduction in pay.

(5) Disciplinary lateral job change.

(6) Interim rating or *unsatisfactory* follow-up rating, as provided in rule 2-3.4(d) [Interim and Follow-up Ratings] and rule 3-6.5 [Grievance of Probationary Rating or Discipline].

(d) A tangible adverse employment action caused by the abolition or creation of a position.

- (e) An arbitrary and capricious lateral job change resulting in substantial harm.
- (f) Denial of compensation to which the grievant was entitled under the civil service rules and regulations.
- (g) A tangible adverse employment action taken in retaliation for the employee's good faith exercise of grievance or technical complaint rights provided in the civil service rules or regulations.
- ~~(gh)~~ An action that substantially harmed the employee and violated (1) article 11, section 5 of the Michigan constitution, (2) a civil service rule or regulation, (3) a departmental work rule, or (4) an enforceable written grievance settlement permitted by the civil service rules or regulations.
- ~~(hi)~~ Any other action for which the civil service rules or regulations specifically permit a grievance appeal to be filed.

8-2.3 Further Limitations on Grievance Appeals

The following additional limitations apply to a grievance appeal unless the grievant alleges that ~~the~~ a tangible adverse employment action resulted from an action of the appointing authority that violated rule 1-8 [Prohibited Discrimination] or rule 2-10 [Whistleblower Protection]:

- (a) Probationary employee without status.** A probationary employee without status cannot appeal the final grievance decision of the appointing authority regarding any of the following:
- (1)** A probationary rating, an interim rating, or a follow-up rating.
 - (2)** A decision to extend an employee's probationary term.
 - (3)** A decision by the appointing authority to discipline the employee, including dismissal, during the probationary period or within 28 calendar days after the end of the probationary period.
- (b) Probationary employee with status.** A probationary employee with status cannot appeal the final grievance decision of the appointing authority regarding a decision to extend the employee's probationary term.
- (c) Reprimand or counseling.** An employee cannot appeal the final grievance decision of the appointing authority regarding a reprimand or counseling.

* * *

Staff Comments to Draft Rules 8-4 and 8-7

Currently, Rule 8-4(a) permits administrative dismissal of grievance appeals and technical complaints when the grievant or technical complainant is not authorized to file the matter. The Employment Relations Board, in *In re Technical Complaint of Robert Horn*, ERB 2003-016, has identified some inconsistency in the interaction of Rule 8-4(a) and Regulation 8.02, Technical Classification and Qualification Complaints. The ERB held that a provision in Regulation 8.02—that permits a Technical Review Officer to administratively dismiss a complaint that “fails to set forth allegations with sufficient particularity to permit review”—was inconsistent with Rule 8-4. In order to avoid further inadvertent incompatibility with the list of long-recognized matters not subject to technical review (e.g., the official classification plan, etc.), staff recommends that Rule 8-4(a) be amended to include a reference to the “rules and regulations” and that a specific reference to improper subject matter be added.

Staff also recommends an amendment to recognize specifically in the rules the authority of adjudicating officers to summarily dismiss claims when a grievant or technical complainant fails to respond to a deficiency notice. This amendment codifies in the rules current administrative practices authorized under Regulation 8.06.

Staff also recommends parallel amendments to Rule 8-7.

8-4 Summary Dismissal of Grievance Appeal or Technical Complaint

A civil service adjudicating officer may summarily dismiss a grievance appeal or technical complaint for any of the following reasons:

(a) Not authorized. The adjudicating officer lacks the authority to consider the grievance appeal or technical complaint under the civil service rules and regulations for either of the following reasons:

(1) The grievant or technical complainant is not authorized to file the grievance, grievance appeal, or technical complaint.

(2) The subject matter of the grievance, grievance appeal, or technical complaint is not reviewable in the forum selected.

(b) Lack of jurisdiction. The department of civil service lacks jurisdiction over a necessary party or over the subject matter of the grievance appeal or technical complaint.

(c) Untimeliness. The grievance, grievance appeal, or technical complaint was not filed timely.

1 (d) **Another action pending.** Another civil service action has been initiated between the
2 same parties involving substantially the same grievance or technical complaint.

3 (e) **Barred by prior claim.** Substantially the same grievance or technical complaint was
4 adjudicated to finality in another action between the same parties.

5 (f) **Failure to respond.** A grievant or technical complainant fails to respond to a
6 deficiency notice issued by the Department of Civil Service, as provided in the civil
7 service rules and regulations.

8
9 * * *

11 8-7 Appeal to Civil Service Commission

12
13 * * *

14 8-7.4 Summary Dismissal of Claim or Application

15 A civil service administrative officer may recommend that the civil service commission
16 summarily dismiss a claim or application for any of the following reasons:

17 (a) **Not authorized.** The appellant is not authorized to file the appeal or the claim or
18 application is not subject to review by the commission.

19 (b) **Lack of jurisdiction.** The department of civil service or the civil service commission
20 lacks jurisdiction over a necessary party or over the subject matter of the appeal.

21 (c) **Untimeliness.** The claim or application is untimely.

22 (d) **Another action pending.** Another civil service action has been initiated between the
23 same parties involving substantially the same matter.

24 (e) **Barred by prior claim.** Substantially the same matter was adjudicated to finality in
25 another action between the same parties.

26 (f) **Failure to respond.** A grievant or technical complainant fails to respond to a
27 deficiency notice issued by the Department of Civil Service, as provided in the civil
28 service rules and regulations.